90-1928

Supreme Court, U.S.
FILED
JUN 13 1991
OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANTOINETTE RUSSO and MILDRED MALONEY,
Petitioners,

vs.

CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, SCOTT POHLMAN, CARL FROST, RICK MARTIN and KEN FROST,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NOT FOR PUBLICATION

No. 90-3240
No. 90-3241

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTOINETTE RUSSO (No. 90-3240)
MILDRED MALONEY (No. 90-3241)

Plaintiffs-Appellants,

v.

CARL MASSULLO, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: MILBURN and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

PER CURIAM: Plaintiffs-appellants Antoinette Russo and Mildred Maloney appeal from summary judgments for defendants-appellees Beaver Township, Carl Massullo (chief of the Beaver Township Police Department), Scott Pohlman (an

investigator with the Ohio Department of Liquor Control), and various members of the Beaver Township Police Department[1] in two separate actions brought under 42 U.S.C. § 1983 alleging violations of constitutional rights (along with pendent state claims) resulting from a raid by the defendants on a liquor establishment for illegal gambling activities. For the reasons that follow, we affirm in part and reverse in part.

I.

On February 16, 1990, the district court granted summary judgment against each plaintiff in favor of all defendants. Separate notices of appeal were timely filed, and the cases, having arisen out of the same incident, were consolidated for appeal.

The facts relevant to this appeal revolve around an armed raid conducted without a warrant on April 16, 1987, at the Stagecoach Restaurant & Lounge ("Stagecoach") located in Beaver Township, Ohio. At approximately 9:30 p.m. defendants Frost and Martin, police officers employed by Beaver Township, entered the premises armed with shotguns and pistols. The purpose of the raid was the "closeout" of an investigation conducted by the Ohio Department of Liquor Control ("ODLC") of gambling in the Stagecoach -- a licensed vendor of alcoholic beverages. The closeout consisted essentially of serving notices of noncompliance on the Stagecoach plus seizure of two alleged illegal gam-

[1]Defendant Pohlman was named only in his individual capacity. The township police officers and Massullo were sued in both their individual and official capacity. The township police officers and Massullo were sued in both their individual and official capacities.

bling machines ("video poker machines").

When the officers arrived at the Stagecoach, it was featuring a stage entertainer and was comparatively full of customers. According to deposition testimony of plaintiff Russo, the owner of the Stagecoach, and plaintiff Maloney, an employee who had finished her shift at 6:00 p.m. and was listening to the entertainment, officers Frost and Martin entered the premises, pointed their weapons at the persons inside, and ordered everyone inside the establishment to raise their hands over their heads. Approximately five to eight law enforcement officers followed officers Frost and Martin inside. During the first thirty minutes of the raid, a pat-down search of everyone inside the establishment was conducted, and the customers were generally allowed to leave as soon as they were searched. As the raid continued, plaintiff Russo repeatedly asked whether the officers had brought a search warrant but was told that they did not need one. Also, during this time frame, both Russo's and Maloney's purses were searched, and neither was allowed to go to the restroom without being accompanied as far as the door by a female officer. The entire incident lasted approximately two hours, and before leaving, ODLC investigators served the violation notices and seized the two alleged gambling machines.

Approximately a week after the raid, investigator Scott Pohlman filed criminal complaints against both Russo and Maloney for violations of Ohio's gambling laws. Also, the Ohio Liquor Control Commission instituted proceedings regarding Russo's continued licensure and, in an order dated

February 23, 1988, gave Russo the option of paying a forfeiture of $1400 or having her license suspended from March 22, 1988, until April 5, 1988. Both women were arrested and prosecuted, but the criminal charges were dismissed because no "testimony was offered that the machines in question were designed or adapted to generate a profit." "[P]ursuant to the acquittal rendered in Mahoning County Municipal Court," the Liquor Control Commission set aside the suspension and forfeiture and ordered the case involving Russo's license dismissed. J.A. 394.

The investigation of the Stagecoach was begun pursuant to a request by defendant Massullo to the ODLC. Part of Massullo's reason for seeking an outside investigation was an injunction issued in State v. Garono, No. __ (C.P. Mahoning County April 3, 1985), aff'd in part, Garono v. State, 37 Ohio St.3d 171, 524 N.E.2d 496 (1988), which forbade the state and Beaver Township (among others), their officers, agents, etc., from seizing machines owned by Garono Vending Co., the company that owned the machines inside the Stagecoach. Pohlman denied any knowledge of the injunction.

According to Pohlman, who conducted the investigation and led the closeout, he understood Ohio law to require more than mere possession of a poker machine by a liquor establishment in order to establish illegal conduct. Thus, Pohlman's goal in investigating was to obtain or witness a "payoff" from the establishment. Pohlman investigated and asserted that he had observed and obtained payoffs at the Stagecoach. Plaintiffs deny that the Stage-

coach made payoffs, and logs kept by Pohlman of his daily activities during the investigation fail to confirm his statements that payoffs were made.

Shortly before the raid, ODLC contacted Massullo and requested assistance. Massullo supplied armed officers without inquiring about the investigation and without instructing the officers regarding the use of firearms. According to the plaintiffs, Massullo entered the Stagecoach while his officers were present and praised them. Massullo later issued a press release publicizing the "cooperation" between his department and ODLC.

Pohlman characterized the township police department's function as providing security. Pohlman explained that he felt there was a need for additional security because he had observed fights inside the Stagecoach.

The principal issues presented in this appeal are (1) whether the district court impermissibly engaged in weighing the evidence and making credibility determinations in considering the motions for summary judgment, (2) whether qualified immunity was precluded by defendants' alleged actual knowledge of a state court injunction prohibiting seizure of the machines or actual knowledge that under Ohio law mere possession of the machines by a liquor establishment was not enough to establish their illegality, (3) whether there was a genuine issue of fact that Beaver Township had a policy or custom that was the moving force behind the alleged constitutional injuries, and (4) whether the district court should entertain the pendent claims.

II.

A.

In ruling on a motion for summary judgment, the district court must construe all the evidence and inferences to be drawn from the evidence in the light most favorable to the nonmoving party. 60 Ivy Street Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987). Summary judgment is appropriate if there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Thus, summary judgment is inappropriate "[w]here the record taken as a whole could . . . lead a rational trier of fact to find for the non-moving party." Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

A section 1983 action must be based upon violation of a federal constitutional or statutory rights. Qualified immunity is available to officials performing discretionary functions unless "the contours of the right that the government official allegedly violated [were] 'sufficiently clear that a reasonable official would have understood that what he is doing violates that right.'" Poe v. Haydon, 853 F.2d 418, 425 (6th Cir. 1988) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987), cert. denied, 488 U.S. 1007 (1989). When the dispositive issue is qualified immunity, the court should deny summary judgment if there is a genuine issue of fact on which the question of immunity turns. Id. Rulings on qualified immunity and summary judgments are reviewed de novo. Eugene D. v. Karman, 889 F.2d 701, 706 (6th Cir. 1989), cert. denied, 110 S. Ct.

2631 (1990); Storer Communications, Inc. v. National Ass'n of Broadcast Employees, 854 F.2d 144, 146 (6th Cir. 1988).

B.

In granting summary judgment for the defendants, the district court held that a state statute which granted ODLC the right to conduct an administrative inspection of liquor establishments coupled with the belief that gambling violations were occurring on the premises justified the defendants' actions. The district court held that the statements of Pohlman were sufficient to establish probable cause for the seizure and arrest. The court also held that the pat-down search and the presence of armed officers was reasonable under the circumstances, but the court failed to discuss the alleged pointing of the weapons at persons inside the Stagecoach. Finally, the district court held that there was no evidence of an established custom or policy by Beaver Township upon which to base liability.

Plaintiffs challenge the district court's ruling as an improper weighing of the evidence and resolution of disputed issues of fact. Plaintiffs also point to alleged actual knowledge on the part of the defendants that their conduct was illegal and argue that liability is proper against Beaver Township given defendant Massullo's final control over day-to-day enforcement matters.

C.

Given the emphasis the parties in this case place upon what was or what was not clearly established Ohio law, we feel compelled at the outset of our discussion to point out that the proper focus in section 1983 actions is upon whether a federal constitutional or statutory right is clearly established. See Washington v. Starke, 855 F.2d 346, 348 (6th Cir. 1988). Although a state supreme court decision may clearly establish a right, Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988), the right must originate in federal constitutional or statutory law. See Dunn v. Tennessee, 697 F.2d 121, 125 (6th Cir. 1982), cert. denied, 460 U.S. 1086 (1983). Thus, in this case, we are concerned with Ohio law only to the extent of its impact upon plaintiffs' federal rights. The right we first examine is plaintiffs' Fourth Amendment right to be free from an unreasonable search.

Since the liquor industry is a pervasively regulated industry, a legislative body can provide for a warrantless administrative inspection of liquor establishments. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). The search in this case was conducted pursuant to an Ohio statute which purports to give the ODLC authority to "[i]nspect, upon demand, the books, accounts, records, memorandums, and place of business of any [liquor establishment]." Ohio Rev. Code Ann. § 4301.10(A)(6). However, at the time of the search, it was clearly established that even where a legislative body provides for an administrative inspection of a liquor establishment without consent, but has "made no

rules governing the procedure that inspectors must follow, the Fourth Amendment and its restrictive rules apply." Colonnade Catering, 397 U.S. at 77.

Plaintiffs point out that after the raid, the statute which authorizes warrantless administrative inspections was struck down by the Supreme Court of Ohio as unconstitutional for failing to establish time, place, and scope limitations on warrantless searches. State v. VFW Post 3562, 37 Ohio St. 3d 310, 525 N.W.2d 773 (1988). Since the statute had not been struck down at the time of the raid, defendants rely on the rule that "[s]tate statutes like federal ones are entitled to [a] presumption of constitutionality until their invalidity is judicially declared." Beech v. Melancon, 465 F.2d 425, 426 (6th Cir. 1972), cert. denied, 409 U.S. 114 (1973); see also V-1 Oil Co. v. Wyoming, 902 F.2d 1482, 1489 (10th Cir.), cert. denied, 111 S. Ct. 295 (1990). Although we agree with the defendants that they had a right to conduct an administrative inspection based on the presumptive constitutionality of the statute, we do not agree that the statute was enough to clothe in qualified immunity those actions which went beyond those specifically authorized by the statute. See Colonnade Catering, 396 U.S. at 77.

Defendant Pohlman also seeks to justify the search on the basis that the draw poker machines inside the Stagecoach were "gambling devices," Ohio Rev. Code Ann. § 2915.01(F), the mere presence of which inside a liquor establishment constituted a crime. See Ohio Admin. Code § 4301:1-1-53 [hereinafter "Reg. 53"]. However, as we previously intimated, we do not question defendants' right to

enter and inspect, but we do question the scope and manner of the inspection.

D.

Turning again to plaintiffs' clearly established rights, at the time of the raid, it was clearly established that the authority to search a tavern did not give accompanying authority to search persons inside the tavern absent a reasonable belief that the particular person searched was involved in criminal activity or was dangerous.[2] Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). Also, as mentioned earlier, it was clearly established that where a legislative body provides for an administrative inspection of a liquor establishment without consent, but makes "no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." Colonnade Catering, 397 U.S. at 77. It was also clearly established at the time of the raid that reasonableness is the "ultimate standard . . . embodied in the Fourth Amendment." Hill v. McIntyre, 884 F.2d 271, 277 (6th Cir. 1989) (quoting Michigan v. Summers, 452 U.S. 692, 699-700 (1981). "[T]he test for the entry itself and all subsequent conduct is whether these are reasonable." Id. (citing Duncan v. Barnes, 592 F.2d 1336, 1338 (5th Cir. 1979). By stepping outside these bounds, a defendant sheds the cloak of qualified immunity.

With regard to qualified immunity, the

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[2]We do not intend to indicate that plaintiffs may assert the constitutional rights of others such as patrons in this action; however, we do believe that the search of patrons is relevant to the reasonableness of the scope and manner of the search and to possible injury to Russo's business.

dispositive question becomes whether a reasonable official in the defendants' position could have believed that the scope and manner of the search was reasonable. Poe, 853 F.2d at 423-24. Assuming, as we must, that the underlying factual disputes will be resolved in favor of plaintiffs, we are not convinced that the defendants could have believed that the scope and manner of the search was reasonable. Thus, we hold that summary judgment based on qualified immunity was improper regarding the scope and manner of the search.

The defendants attempt to evade liability by pointing to each other. However, their arguments are unpersuasive in light of cases holding that all members of the team are liable where there is a team effort or where the members were an integral part of an unlawful search and seizure. See Bruner v. Dunaway, 684 F.2d 422, 425-26 (6th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); Simpson v. Hines, 903 F.2d 400, 403 (5th Cir. 1990); Melear v. Spears, 862 F.2d 1177, 1186 (5th Cir. 1989); Gutierrez-Rodriquez v. Cartagena, 882 F.2d 553, 561 (1st Cir. 1989). Moreover, on this record, we are not convinced that a jury could not find that Pohlman and Massullo "at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct." Birrell v. Brown, 867 F.2d 956, 959 (6th Cir. 1989).

E.

We next address plaintiffs' argument that qualified immunity is precluded by defendants' alleged actual knowledge that there was an injunction

against seizure of the machines and actual knowledge that mere possession of the machines was not enough to establish their illegality. We find this argument more relevant to the seizure of the machines and the arrest of plaintiffs than to the search issue we previously addressed. In dealing with this argument, we find it necessary to recognize a distinction between Pohlman, who instigated the seizure with statements that the Stagecoach was making payoffs, and the other defendants who apparently relied, at least indirectly, on Pohlman's statements.

At the time of the complained of acts, it was well-established that law enforcement officers may not effect an arrest or seizure by making false statements knowingly or with reckless disregard as to their truth. See Hill, 884 F.2d at 275 (citing Donta v. Hooper, 774 F.2d 716, 718 (6th Cir. 1985) (per curiam), cert denied, 483 U.S. 1019 (1987); Franks v. Delaware, 438 U.S. 154, 155-56 (1978); see also Malley v. Briggs, 475 U.S. 335 (1986). Plaintiffs' strongest arguments in regard to the illegality of their arrest and seizure of the machines is that they would not have occurred but for Pohlman's alleged false statements that payoffs were made.

We examine plaintiffs' arguments recognizing that our inquiry regarding qualified immunity is not into an officer's subjective beliefs, but center on the objective reasonableness of the officer's actions. See Anderson v. Creighton, 483 U.S. 635, 641 (1987); Ecclesiastical Order of the Ism of Am v. Chasin, 845 F.2d 113, 117 (6th Cir. 1988). However, in the context of this case, plaintiffs' argu-

ments persuade us that Pohlman could not reasonably have believed that the mere presence of the draw poker machines inside a liquor establishment was enough to justify seizure of the machines and criminal charges.

Although Reg. 53, which Pohlman relies upon to justify the arrests and seizure of the machines, was not specifically struck down until 1988 in State v. VFW Post 3562, it was strongly questioned as being overly broad by the Ohio Supreme Court's decision in Mills-Jennings of Ohio, Inc. v. Department of Liquor Control, 70 Ohio St. 95, _, 435 N.E.2d 407, 411 (1982). In fact, counsel for ODLC conceded during oral argument before the Ohio Supreme Court in Mills-Jennings that Reg. 53 should not be interpreted to go beyond the specific provisions of the criminal code. On remand, the Ohio Court of Appeals clearly held that mere possession of a draw poker machine by a liquor establishment was not enough to establish illegality. Mills-Jennings of Ohio, Inc. v. Liquor Control Comm'n, 16 Ohio App. 3d 290, _, 475 N.E.2d 1321, 1325 (1984).

Consistent with its earlier concession to the Ohio Supreme Court, at the time of the raid on the Stagecoach in 1987, the ODLC refrained from prosecution short of evidence to establish "that the intent of the device on the premises is to gamble." J.A. 393. the injunction that plaintiffs rely on in this case became the basis of a 1988 holding of the Ohio Supreme Court in Garono v. State, 37 Ohio St. 3d 171, 524 N.E. 2d 496, that mere possession of a gambling device by a liquor establishment was not enough to establish illegality. Consistent with all

these interpretations was Pohlman's own testimony that he understood the law to require more than mere presence of the machines inside a liquor establishment, i.e., a payoff. Qualified immunity is not intended to protect those who knowingly violate the law. Malley, 475 U.S. at 341; see Birrell, 867 F.2d at 958. Under these circumstances, we are convinced that Pohlman could not, and in fact did not, reasonably believe that the mere presence of the machines inside a liquor establishment was enough to establish their illegality.

Thus, the only basis for the seizure of the machines and the subsequent arrests is Pohlman's statements that he witnessed and received payoffs. If Pohlman made the statements falsely and knowingly, or with reckless disregard for their truth, then a constitutional violation is shown for which Pohlman had no immunity defense.

However, the individual members of the Beaver Township police force (including Massullo) are differently situated. They were relying on the assertions of a second law enforcement department that an offense had occurred. At the time it was not clearly established that this was not a reasonable basis for the probable cause needed for a seizure. See Donta, 774 F.2d at 721. Absent evidence that members of the township police force participated in Pohlman's alleged falsehood, the "team effort" rationale does not extend to the seizure.

In regard to the arrest, there is nothing to show that the defendant members of the Beaver Township Police Department pursued the matter beyond their participation in the search and seizure

of the machines. Plaintiffs' allegations of conspiracy are only colorable at most. Accordingly, we hold that the summary judgments in favor of members of the township police force (including Massullo) were justified insofar as seizure of the machines and the subsequent arrest of the plaintiffs. On the other hand, we hold that the summary judgments in favor of Pohlman were inappropriate.

F.

Before liability can be imposed on a governmental entity such as Beaver Township, there must be a showing that constitutional injury was inflicted "pursuant to a governmental custom or policy." Yancey v. Carroll County, 876 F.2d 1238, 1243 (6th Cir. 1989) (citing Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978)). Based on Massullo's testimony that he had final control over day-to-day police matters and that he sometimes made policy without submitting his decisions to the township board of trustees, there is some evidence from which a jury could reasonably conclude that Massullo could set policy. See Johnson v. Hardin County, 908 F.2d 1280, 1286 (6th Cir. 1990). However, a plaintiff must show that "deliberate and discernable municipal policies or customs" were the moving force behind the constitutional injury. Beddingfield v. City of Pulaski, 861 F.2d 968, 971 (6th Cir. 1988). In this case plaintiffs have failed to even articulate what they perceive to be the "deliberate and discernable" policy, much less offer evidence to establish the existence of such policy. Consequently, we hold that the district court cor-

rectly granted summary judgment in favor of Beaver Township.

G.

The final issue we address concerns plaintiffs' pendent state claims. Upon granting summary judgment on the federal claims, the district court dismissed the state claims pursuant to United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). To the extent that we have determined federal claims exist to support pendent jurisdiction, we disagree with the dismissal of the state claims.

Defendant Polhman offers an alternate ground to oust the district court of jurisdiction over the state claims. Pohlman correctly cites Haynes v. Marshall, 887 F.2d 700, 704 (6th Cir. 1989), for the proposition that Ohio state claims against state employees must be first presented to the Ohio Court of Claims. Since the district court is in a better position to determine whether or not there has been a presentation to the Ohio Court of Claims, and since the district court did not address this issue given its focus on other matters, we believe it is more appropriate to allow the district court to consider this argument on remand. See Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970).

III.

For the reasons stated, the summary judgments in favor of Beaver Township on the federal claims are AFFIRMED. the summary judgments in favor of members of the Beaver Township police force on the federal claims are AFFIRMED with

regard to the seizure of the machines and the arrest of the plaintiffs but REVERSED with regard to the alleged unreasonable search of the plaintiffs and premises. The summary judgments in favor of defendant Pohlman on the federal claims are REVERSED. The dismissal of the pendent state claims is reversed to the extent that federal claims exist to support pendent jurisdiction, and the case is REMANDED for further proceedings consistent with this opinion.

ISSUED AS MANDATE: March 27, 1991
COSTS: (Pending)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTOINETTE RUSSO, etc.

Plaintiff

-vs-

CARL MASSULLO
BEAVER TOWNSHIP
CARL FROST
RICK MARTIN
KEN FROST
JOHN DOE, NOS. 1-7
SCOTT POHLMAN

Defendants

JUDGE ALVIN KRENZLER

CASE NO. C88-928Y

MILDRED MALONEY

Plaintiff

-vs-

CARL MASSULLO
BEAVER TOWNSHIP
CARL FROST
RICK MARTIN
KEN FROST
JOHN DOE, NOS. 1-7
SCOTT POHLMAN

Defendants

CASE NO. C88-929Y

MEMORANDUM OF OPINION RE: GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Plaintiff, Antoinette Russo, filed Case No. C88-928Y against the above named defendants. Plaintiff, Mildred Maloney, filed Case No. C88-929Y against the above named defendants. Because both cases arose out of the same operative facts, this Court will, for the sake of judicial economy, issue one memorandum of opinion for both cases.

The plaintiffs filed these companion complaints on April 14, 1988, alleging causes of action under 42 U.S.C. § 1983 for violations of constitutional rights protected by the fourth, fifth, ninth and fourteenth amendments to the Constitution. The complaints also alleged causes of action under the state law torts of assault, false arrest and imprisonment, malicious prosecution, intentional interference with contractual relations and intentional infliction of emotional distress. These causes of action arose from the same set of events, which occurred on April 16, 1987. Each plaintiff filed amended complaints on October 17, 1988, to correct the designations of several defendants.

The defendants filed motions for summary judgment in both cases in November of 1988. Although defendant Scott Pohlman filed his motion separately from those of the other defendants, Carl Massullo, Beaver Township, Carl Frost, Rick Martin, Ken Frost, and John Does 1-7, the issues raised by both sets of motions are substantially the same. Therefore, the Court will Address the motions for summary judgment filed by all defendants in both of these companion cases simultaneously. For the

reasons described later in this memorandum, the Court is granting defendants' motions for summary judgment.

FACTS

The operative facts of this case are as follows: On February 2, 1987, Beaver Township Police Chief Carl Massullo, having received anonymous tips that gambling activity was occurring on the premises of several licensed liquor establishments in the vicinity of Beaver Township, wrote a letter to Michael Dodd of the Ohio Department of Liquor Control ("DLC") in Akron. In this letter, defendant Massullo ("Massullo") requested the assistance of the DLC in investigating certain illegal gambling activities at these locations in Mahoning County, the county in which Beaver Township is situated.

Pursuant to this letter, the DLC began an undercover investigation of these locations, one of which was the Stagecoach Restaurant & Lounge ("Stagecoach"), which was owned and operated by plaintiff, Antoinette Russo ("Russo"). The DLC employee primarily conducting the investigation was defendant, Scott Pohlman ("Pohlman"). During his investigation of the Stagecoach in the month of March 1987, Pohlman observed the presence there of two video "draw poker" machines. These machines are video games which simulate the game of poker. They allow a player to vary the amount of risk by placing different amounts of money into the machine, and if a player receives enough points to enable him to win free games, such machines allow him to trade in these extra points for cash. This practice is known as giving or receiving a "payoff."

Pohlman testified in his deposition that while he was undercover at the Stagecoach, he observed such payoffs to customers, and in fact received a payoff from plaintiff Mildred Maloney ("Maloney"), who was then the cook at the Stagecoach. Pohlman informed his superior that these activities were occurring, and a meeting was scheduled to coordinate enforcement efforts. DLC investigators, including Pohlman, and members of Beaver Township Police, including defendants, Massullo, Frost and Martin, were present at this meeting. The evening of April 16, 1987, was chosen as the date on which the Stagecoach would be entered, its owner cited for gambling violations, and the video draw poker machines seized and confiscated. DLC requested that, for the purpose of protecting its agents, several armed, uniformed officers of the Beaver Township police be present at this raid.

On the evening of April 16, 1987, at approximately 9:30 p.m., two agents from the DLC, followed by two officers of the Beaver Township Police Department and two plainclothes agents from the Internal Revenue Service, entered the Stagecoach and proceeded to issue citations to its owner. For their own protection, one or more of the agents initially performed patdown searches of some customers and inspected the premises to determine if any concealed weapons were present. During the course of the evening, plaintiffs were questioned about the ownership of the poker machines, which were later learned to be leased by Russo from Garono Vending Company. Russo, in her deposition, testified that she answered no questions until

her attorney was present, and also that her purse was searched by one of the agents. At different points during the raid, Massullo and Pohlman each stopped in at the Stagecoach to check on the progress, but remained there only for a brief time. At approximately 11:20 p.m., the agents and officers left the Stagecoach, the DLC agents having confiscated the poker machines. One week later, on April 22, 1987, plaintiffs were charged with gambling and operation of a gambling house.

LAW

The complaints in these cases allege generally that the defendants' search, seizure, detention and arrest of the plaintiffs under color of Ohio law violated the plaintiffs' rights under the fourth, fifth, ninth and fourteenth amendments to the Constitution. The complaints also allege that defendant Beaver Township, pursuant to an established custom or policy of permitting constitutional violations, allowed these acts to occur. According to the plaintiffs, this conduct, in addition to giving rise to various state common law torts, places the defendants within the bounds of 42 U.S.C. § 1983, which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Although no affirmative defenses are explicitly provided for by this section, it is well established that two types of immunity may be asserted by defendants as affirmative defenses.

Absolute immunity is an affirmative defense commonly asserted by judges and prosecutors who are defendants in § 1983 actions. It may be granted by the court if the defendant's acts were committed within the scope of his official duties. When it is granted, it shields the defendant from liability.

Qualified immunity is another affirmative defense, commonly asserted by law enforcement officers. Indeed, qualified innunity is asserted by all the defendants in this case. Qualified immunity serves an important purpose--it "accommodates two important competing interests. On the one hand, an action for damages may be the only realistic avenue for vindication of constitutional guarantees' where officials violate the public trust." Poe v. Haydon, 853 F.2d 418, 424 (6th Cir. 1988) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736 (1982). On the other hand, "government officials must be given some assurance that they can perform their duties without fear of monetary liability or the diversions inherent in litigation. The doctrine of qualified immunity seeks to achieve this salutary goal." Poe, 853 F.2d at 424.

Qualified immunity will be granted to a defen-

dant if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. This objective standard, established by the Supreme Court in the Harlow case in 1982, was a substantial departure from the previous standard for qualified immunity, which had both objective and subjective elements. The purpose of eliminating the subjective element was to "avoid excessive disruption of government and [to] permit the resolution of many insubstantial claims on summary judgment." Id.

This objective standard was recently clarified by the Supreme Court in Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987). The Court in Creighton explained that "[t]he operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Creighton, 483 U.S. 635, 639-40, 107 S. Ct. 3034, __.

An important element of the standard is that of "clearly established" law. To determine whether law is clearly established, one must look first at the decisions of the Supreme Court and the courts of the circuit in which the case is tried. Poe, 853 F.2d at 424; Garvie v. Jackson, 845 F.2d 647, 649 (6th Cir.

1988). One may also look to the decisions of the highest state court in the state where the case arose. Robinson v. Bibb, 840 F.2d 349, 352 (6th Cir. 1988).

It is also settled that the "[r]esolution of that issue [of clearly established law] is purely a matter of law for the trial judge to determine." Dominque v. Telb, 831 F.2d 673, 377 (6th Cir. 1987). The Sixth Circuit added in Dominque that "[t]he source for that determination is, of course, in federal constitutional, statutory or case law existing at the time." Id.

In order for the plaintiffs to establish a violation of constitutional rights which would allow them redress under 1983, the plaintiffs must show that the official conduct of the defendant officers and agents rose above mere negligence. Yancey v. Carroll Cy., Ky., 876 F.2d 1238, 1242 (6th Cir. 1988) (citing Nishayama v. Dickson Cy., Tn., 814 F.3d 277, 281 (6th Cir. 1987) (en banc)). As the Sixth Circuit stated in Yancey, "[i]nvestigation, without more, simply does not rise to the level of a constitutional violation cognizable under 42 U.S.C. § 1983." Yancey, 876 F.2d at 1245.

Similarly, "[w]ith reference to a governmental entity, the [plaintiff] can show a violation or §1983 only if the entity's supervisory personnel cause constitutional deprivations pursuant to a governmental custom or policy. Id. at 1243 (citing Monell v. Dept. of Social Services of New York, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035 (1978)).

At the time the facts of this case arose, April 1987, the body of law regarding searches and seizures appeared as follows: The fourth

amendment's prohibition against unreasonable searches and seizures was extended to the area of administrative inspections of commercial property. Marshall v. Barlow's Inc., 436 U.S. 307, 56 L. Ed.2d 305, 98 S. Ct. 1816 (1978). This is only proper, since the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, __, 18 L. Ed.2d 930, (1967). The mechanism by which the fourth amendment fulfills this purpose is the requirement of a warrant based on probable cause.

However, there are several recognized exceptions to the warrant requirement. One of these deals with "closely regulated industries." As the Court explained in Marshall v. Barlow's, Inc., "[t]he element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." Marshall, 436 U.S. at 313, 98 S. Ct. 1816, , 56 L. Ed.2d 305, 312.

> In these closely regulated industries, a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

Donovan v. Dewey, 452 U.S. 594, 600, 101 S. Ct. 2534, __, 69 L. Ed.2d 262, 270 (1981). The liquor industry is recognized as such an industry. Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed.2d 60 (1970). Thus, it is clear that warrantless searches of licensed liquor premises were constitutionally valid in 1987.

In the state of Ohio, the liquor industry is regulated by the Department of Liquor Control, which issues permits to engage in the sale of alcohol. As the Supreme Court of Ohio stated in Solomon v. Liquor Control Commission, 4 Ohio St.2d 31, 33 Ohio Op.2d 339 (1965), "[o]ne who applies for and is issued a permit to sell alcoholic beverages thereby assents to the reasonable and lawful conditions imposed by statute and rule." Id. at 33, 33 Ohio Op.2d at 341.

The Department of Liquor Control is authorized under Ohio Rev. Code Ann. § 4301.10 to "[e]nforce Chapters 4301 and 4303 of the Revised Code, and the rules and orders of the liquor control commission and director." Ohio Rev. Code Ann. § 4301.10(A)(4). The rules of the liquor control commission are found in the Ohio Administrative Code. Former Ohio Admin. Code 4301:1-1-53, dealing with gambling and gambling devices, stated as follows:

> (B) No person authorized to sell alcoholic beverages shall have, harbor, keep, exhibit, possess or employ or allow to be kept, exhibited or used in, upon or about the premises of the permit holder of any gambling device as defined in

> division (F) of section 2915.01 of the Revised Code which may or can be used for gambling offenses as defined in division (G) of section 2915.01 of the Revised Code.

Ohio Admin. Code 4301:1-1-53(B). The Department of Liquor Control was also entitled to "inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301 and 4303 of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol." Ohio Rev. Code Ann. § 4301.10(A)(6). The combination of these statutes and regulations authorized the Department of Liquor Control to inspect licensed liquor premises for illegal gambling activities and devices during the time period in question.

In 1987, the state of the law regarding gambling devices in Ohio was as follows: In 1982, the Supreme Court of Ohio, in Mills-Jennings of Ohio, Inc. v. Department of Liquor Control, 70 Ohio St.2d 95, 24 Ohio Op.3d 181, 435 N.E.2d 407 (1982), determined that the video poker machines involved in that case were used to play the game of poker, which is a game of chance under Ohio Rev. Code Ann. § 2915.01(D). Id. at 97, 24 Ohio Op. at 182, 435 N.E.2d at 408. The court also held that these poker machines were per se gambling devices under Ohio Rev. Code Ann. §2915.01(F). Id. These conclusions were supported by this court's opinion in United States v. One Hundred Thirty-Seven Draw Poker-Tyoe Machines and Six Slot Machines, 606 F.

Supp. 747 (D.C, N.D. Ohio 1984). As Judge Manos stated in that opinion, "there can be no doubt that the defendant draw poker machines are designed and manufactured primarily for use in connection with gambling and by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, money or property." Id. at 754.

The plaintiffs have cited several Ohio cases which are contrary to those discussed above and which cast some doubt upon the state of the law in this area in 1987. The plaintiffs are relying primarily on State v. Gavlek, No. 83 C.A. 25 (Mahoning App., Dec. 27, 1983), which held that poker was not a game of chance and that the poker machines were not illegal gambling devices; and Garono v. State, No. 85 C.A. 44 (Mahoning App., Mar. 27, 1987), which upheld an injunction against the seizure of poker machines owned by Garono Vending Company. The plaintiffs also cite State v. V.F.W. Post 3562, 37 Ohio St.3d 310, 525 N.E.2d 773 (1988), in which the Supreme Court of Ohio held that Ohio Rev. Code Ann. §§ 4301.10(A)(4), (6), and (7) and Ohio Admin. Code 4301:1-1-53 are unconstitutional because they fail to set reasonable time, place and scope limitations on warrantless administrative searches; and Garono v. State, 37 Ohio St.3d 171, 524 N.E.2d 496 (1988), in which the same court held that poker machines could not be seized without evidence of their use for profit.

As to the first two cases, although they were decided by the court of appeals in the same county in which the case at bar arose, they are contrary to

the law adopted by the Supreme Court of Ohio in Mills-Jennings. As discussed previously, the term "clearly established law" means the decisions of the United States Supreme Court, the federal courts of the appropriate circuit, or the highest court of the state in which the controversy arose. Pursuant to this standard, the law adopted by Mills-Jennings was the clearly established law of Ohio until 1988, when the latter two cases were decided. For this reason, the latter two cases are irrelevant in determining what the state of the law was in 1987.

The motions before this Court are the defendants' motions for summary judgment, in which the defendants claim they are entitled to qualified immunity from liability under § 1983.

The granting of summary judgment is authorized by Rule 56(C) of the Federal Rules of Civil Procedure when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(C).

The purpose of motions for summary judgment is to isolate factually insufficient claims and defenses and prevent them from going to trial. Celotex v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). As the Court in Celotex stated: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.'" Id. at _,

106 S. Ct. at __, 91 L. Ed.2d at 276 (quoting Fed. R. Civ. P. 1).

The standard for granting motions for summary judgment has been characterized as essentially a mirror image of that for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby 477 U.S. 242, 106 S. Ct. 2505, __, 91 L. Ed.2d 202, 214 (1986).

The trial judge cannot find that a genuine triable issue exists "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted." Id. at __, 106 S. Ct. at __, 91 L. Ed.2d at 212 (citations omitted).

APPLICATION

The Court will now evaluate the facts of this case with respect to the defendants' rights to qualified immunity, in light of the standards for (1) determining entitlement to qualified immunity which were discussed in the sections above; and (2) granting a motion for summary judgment.

The standard for qualified immunity is whether the officer acted reasonably in light of clearly established law at the time. Here the defendants were conducting a search and seizure pursuant to a state statute which was presumed valid at the time. Their reason for conducting the search and seizure was their reasonable belief that gambling violations were occurring on the premises.

This belief was based on the testimony of defendant Pohlman, who witnessed the presence of poker machines and payoffs to players of these machines, and on the statement of the Supreme Court of Ohio that such machines were illegal gambling devices. Further, while the defendants should not be commended for ignoring an injunction against them, the injunction was contrary to the clearly established law of Ohio at the time these events occurred.

Plaintiffs' complaints suggested that the scope of the defendants' search and the degree of force used were unreasonable. However, law enforcement officers are often placed in situations where they must make split-second decisions affecting their safety, the safety of others, and the preservation of evidence. In this context, the patdown searches of people in a bar where illegal gambling activity is believed to be occurring in order to protect the officers from any concealed weapons is not unreasonable. The presence of armed police officers to maintain order during the search is also not unreasonable. The search of the bar owner's purse for evidence of illegal gambling was not necessarily unreasonable, in light of the authorization of the Department of Liquor Control by Ohio Rev. Code Ann. § 4301.10 to inspect the papers of the licensee upon demand.

Finally, the arrest of plaintiffs was not unreasonable, since it was based on the presence of the poker machines in plaintiff Russo's premises, and on the statements of Pohlman that he witnessed the making of payoffs and on one occasion received one

from plaintiff Maloney. These facts gave rise to probable cause that a crime had been committed by the plaintiffs, thus their arrest was not unreasonable.

The plaintiffs' complaints also allege that the defendant, Beaver Township, permitted such conduct pursuant to an established custom or policy of allowing constitutional violations. However, the plaintiffs fail to supply any evidence of this other than Chief Masullo's participation in the planning of the raid. Since it has already been determined that defendants' conduct in planning and conducting the raid was not unreasonable, this claim must fail.

Therefore, because the defendants acted reasonably in light of the clearly established law in place at the time, they are entitled to qualified immunity. Because the plaintiffs, in opposing defendants' motions for summary judgment, have failed to bring forth sufficient evidence that would allow a jury to bring a verdict in their favor, there is no genuine issue of material fact to be tried. Thus, defendants are entitled to summary judgment on the § 1983 claim.

There are still several state causes of action remaining. The ability of this court to try these state claims was initially due to the doctrine of pendent jurisdiction.

This type of jurisdiction arises when a federal claim, arising under the Constitution, laws or treaties of the United States, is so closely related to a state claim that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, 383 U.S. 715, 725,

86 S. Ct. 1130, ___, 16 L. Ed.2d 218, 228 (1966). However, "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." Id. at 726, 16 L. Ed.2d at 228.

Because the plaintiffs' federal claims under 42 U.S.C.§ 1983 have been eliminated before trial by summary judgment, the state claims against the defendants shall also be dismissed.

UNITED STATES DISTRICT JUDGE

Stephen Gard
Orville Stifel
Todd Raskin
Rita Eppler
Jeffrey Duber
Susan Muskovitz